IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 603.

H. A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF THE INTERIOR, AND HAROLD L. ICKES, AS SECRETARY OF THE INTERIOR,

Petitioners,

v.

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. pp. 97-104) is reported in 114 Fed. (2d) 752. The findings, conclusion and opinion of the Director of the Bituminous Coal Division may be found at Record 1-32.

THE QUESTION PRESENTED.

This case presents only the narrow question whether, on the undisputed facts disclosed by the Record, certain coal mined for the Seaboard Air Line Railway by its contractors is what is generally known as "captive coal" within the meaning of the provisions of the Bituminous Coal Act of 1933 (50 Stat. 72, 15 U. S. C., Secs. 828-851) which exempt such coal from the price-fixing and regulatory provisions of the Act. The specific section involved is:

> 4-II(1) "the provisions of this section shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him."

The court below adjudged merely that this section of the Act is controlling under the proven and undisputed facts of this particular case, and no question of general importance or administrative significance is involved.

STATEMENT.

It should be emphasized at the outset that there is no actual dispute as to the basic facts of this case upon which the determination of the question of law must be predicated. There is no conflict of testimony in the record, as all the evidence was candidly given by witnesses for the railroad, the truth of which has not been challenged. The case has throughout its course involved merely the proper application of the statute in a situation presented by what is in substance an agreed statment of facts. That situation is as follows:

Legh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Company, to insure an adequate and constant supply of coal for the railroads committed to their charge by the District Court of the United States for the Eastern District of Virginia, in 1934 and 1935 by instruments of conveyance, which have been successively extended and renewed, acquired by grant from the owners of coal-bearing lands the sole and exclusive right to take coal from such lands. (R. pp. 3, 11, 15). Concurrently respondents engaged the services of skilled mine operators to perform for them the work and service of extracting and loading on cars at the mine the coal so acquired. (R. pp. 5, 12, 17). All of the coal involved is owned by, shipped by respondents to themselves and consumed by respondents. (R. p. 21). The contractors have or claim no title or interest in the coal either before or after severance, have no right or power of sale or other disposition of the coal and their sole duty is to act in conformity with instructions given them by respondents. (R. pp. 20, 21, and 40-44, incl.). Respondents derive their title to the coal by grant from and direct privity with the owners of the coal-bearing lands and royalty payments for all coal extracted are made by respondents directly to the landowners. (R. pp. 3, 11, 15, 40-44, incl.). Neither respondents nor the contractors have any stock or other interest in or control of the landowners; each and every of the parties to the transactions are separate legal entities and independent of the other or others. (R. p. 24).

The compensation paid by respondents for the work and service performed by the contractors during

each contract period includes all costs of production of the coal as established by the records and experience of the contractors. Such compensation is paid either monthly or semi-monthly, and in some instances weekly, as the necessities of the contractor require. Each of the contracts provides for adjustment of the compensation paid to the contractor to cover fluctuations in production costs. (R. pp. 13, 17, 68).

The Director of the Bituminous Coal Division concluded that the respondents were not engaged in the business of mining the coal involved and on that ground were not producers whose coal was entitled to exemption from the regulatory provisions of the Bituminous Coal Act. (R. p. 26). The United States Circuit Court of Appeals for the Fourth Circuit (R. pp. 97-104) (114 Fed. (2d) 752) in a unanimuous opinion reversed the order of the Director and remanded the matter for entry of an order granting the respondents' petition for exemption.

ARGUMENT.

I.

The issues of this case affect a very small percentage of the amount of bituminous coal produced.* There is no conflict of decisions and no issue of national importance is raised. Similar cases involving the right of a producer to exemption from the regulatory provisions

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* Weekly Coal Report 1173, issued January 6, 1940, by the United States Department of the Interior, Bituminous Coal Division, states:

"The total production of soft (bituminous) coal in the year 1939 is estimated at 389,025,000 net tons."

The production of respondents at their three captive mines during the year 1939 was 565,465 tons, or less than 2-10ths of one per cent of the total production for the whole country.

of the Coal Act have been decided. In *Northwestern Improvement Company* v. *Ickes*, (CCA 8th) 111 Fed. (2d) 221, a petition was filed to review an order of the Director of the Bituminous Coal Division which denied an exemption to the applicant. The court sustained the order of the Director because it was clearly shown that a sale of the coal by the applicant—the producer of the coal—to the railroad company occurred. The basis of the claim to exemption was that the railroad wholly owned the stock of the applicant mining company. *Consolidated Indiana Coal Company* v. *National Bituminous Coal Commission*, (CCA 7th) 103 Fed. (2d) 124, cited by the court below in support of its decision, arose under the same sections of the Bituminous Coal Act as are here involved. In that case, as here, the coal produced was consumed by the railroad company. It was owned by one wholly owned subsidiary of the railroad company and mined by another. The question was whether the coal, which was consumed by the railroad company, or its trustee appointed in reorganization proceedings under Section 77 of the Bankruptcy Act, produced by and through the agency or instrumentality of another, is entitled to exemption under Section 4-II(1) of the Bituminous Coal Act of 1937. The Circuit Court of Appeals for the Seventh Circuit, in reversing the order of the Bituminous Coal Commission and granting the exemption claimed by petitioners, said:

> "Respondent evidently predicated its conclusion upon the theory that petitioner on the one hand, and the trustees on the other, constitued separate corporate entities and ignored the contention advanced by the petitioner that it was merely serving the trustees in the capacity

of an agent and that, as such, it was only an instrumentality of the trustees. In this, we think, respondent is in error. The conclusion is inescapable that petitioner was the agent of the trustees in the production of coal, and this is true irrespective of whether petitioner and the Railway Company be considered as separate and distinct corporations, or whether, under the circumstances, they be considered as merged."

* * * * *

"In the instant situation, the trustees of the Railway Company could produce coal only by agents, and we discern nothing to preclude a corporation from being the agency thus utilized. We, therefore, are of the opinion that the coal involved in this proceeding was produced by the trustees by and through the agency of petitioner, and that it is consumed by the trustees in the operation of its railroad. Being both the producer and the consumer of the coal, it is entitled to the exemption provided in Sec. 4-II(l) of the Act."

* * * * *

"That Congress intended to exclude from the requirements of Section 4 coal consumed by the producer is obvious, and we think it must be held that such exclusion is permissible whether the consumed produced the coal in individual capacity or through the capacity of an agent. To hold otherwise is to countenance a situation in the instant matter which borders close to absurdity."

And again on p. 130 of 103 F. (2d), in rejecting the contention of the Commission that because the Senate had eliminated an amendment to define "producer"

to include a wholly-owned subsidiary, it was the intention of Congress not to permit the exemption of coal produced by such corporation, the court said:

> "To so conclude is to impute to Congress an intention to abrogate the well recognized law of principal and agent."

Notwithstanding the decision in the *Consolidated Indiana* case, supra, adverse to the Bituminous Coal Division, the Commission (predecessor of the petitioners) apparently did not consider the issues raised (which are identical in principle with those involved in this case) to be of sufficient national importance to justify review by this court, for no application for certiorari was made. This court considered the constitutionality and purposes of the Bituminous Coal Act of 1937 in *Sunshine Anthracite Coal Company* v. *Adkins*, 310 U. S. 381, and set up standards upon which the lower courts could rely in reaching their decisions, and which were adopted and applied by the Fourth Circuit Court of Appeals in its decision in the case at bar.

Certiorari was denied by this court in *Sunshine Anthracite Coal Company* v. *National Bituminous Coal Commission*, (CCA 8th) 105 Fed. (2d) 559, cert. denied 308 U. S. 604, rehearing denied 308 U. S. 638. That case was of far greater national importance than the one now at bar. It involved the effect of a far-reaching decision by the Commission upon the question, denied by Sunshine Anthracite Coal Company, of whether all coal produced in the State of Arkansas was bituminous coal subject to regulation under the National Bituminous Coal Act, but this court refused to review the Circuit Court's decision.

The record clearly shows that the contractors do not sell or otherwise transfer any title to the coal to respondents and have no such right of sale or title to transfer; that respondents do not pay the contractors for the coal but for their work and service of mining and loading the coal on cars at the mine for shipment to and consumption by respondents; that respondents, and not the contractors, are the producers of the coal and the contractor is merely the agent or instrumentality through which the coal is produced by respondents. The evidence affords no support for the Director's findings and decision that respondents are not the producers of the coal and are not entitled to the exemption claimed by respondents. The Director's conclusion ignores completely the fact, as held by the court below in this case and as recognized by this court in *Sunshine Anthracite Coal Company* v. *Adkins*, supra, that the price regulation provisions of the Act relate or apply only to coal or transactions in coal in which a sale of or other transfer of title to the coal by the producer occurs. Upon this point the decision by the court below states:

> "The mistake of the Director was due to considering the various incidents of the process of the production and ignoring the vital element of price regulation. There is manifestly nothing upon which price regulation can operate where no price is possible; and no price is possible where *no sale can possibly take place* and all that is involved is the mining of coal under contract for the owner." (Emphasis ours.)

The court below held further that the Director also erred in interpreting the definition of the term

"producer" as contained in Section 17(c) of the Act, which section provides:

> "(c) The term 'producer' includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal."

as being all-embracing. The word "includes" is unambiguous and clearly indicates the definition of "producer" in that section is not all-inclusive.

The error of the Director in holding that respondents are not entitled to the exemption claimed by them because "not engaged in the business of mining coal" is thus pointed out in decision of the court below:

> "Respondent's point to Sec. 17(c) of the Act, which provides that 'The term producer includes all individuals, firms, associations, corporations, trustees and receivers engaged in the business of mining coal.' They argue that only the person, corporation, etc., that does the actual mining comes within the definition. We think that one who has the coal mined through the instrumentality of an independent contractor falls just as clearly within the definition. *Qui facit per alium, facit per se.* Certainly if these petitioners were selling the coal mined for them by the independent contractors, we could not hesitate to hold that they were subject to the code and price-fixing provisions of the Act; and on the same principle we must hold that, where they consume the coal thus produced, they are exempt from those provisions under Sec. 4(l). For the purpose of the Act, we can not see what difference it makes whether the owner of a mine digs the coal himself with his own organization or

> whether he has it dug for him by an independent contractor, who assumes the risks and responsibilities of that relationship. In either event, the owner causes the coal to be mined and prepared for use. He is the one by whom the first sale after production is made, if it is made. If he sells it, he should certainly be held subject to the regulatory provisions of the Act; and if he consumes instead of selling it, there is as much reason for exempting him from the regulatory provisions in the one case as in the other. To say, as does the Director, that petitioners do not pay the cost of mining the coal, is not correct. They pay the cost on a tonnage basis to the contractors. As well say that the builder of a house does not pay the cost of installing the plumbing because he contracts with an independent contractor to install it."

Oliver Iron Mining Company v. *Lord*, 262 U. S. 172, had been decided long prior to the enactment of legislation regulating the coal industry, and it seems probable that this court's decision in that case guided the legislative draftsmen in their method of defining "producer" in the Bituminous Coal Act. In the *Lord* case the principal endeavored to escape the imposition of an occupation tax imposed by the State of Minnesota on the ground that it was not engaged in the business of mining coal. This court rejected its contention and said:

> "Here the selection is of all who are engaged in mining or producing ores on their own account; that is to say, as owners or lessees. The selection seems to be an admissible one, so we turn to the objections urged against it.
>
> "One is that contractors who strip off the over-burden of soil, gravel, etc., in open-

> pit mines, other contractors who load the ore in such mines into cars, and still others, usually four in a group, who take ore out of underground mines, are not included. But none of these are engaged in mining on their own account. Instead, they are working for those who are so engaged. However important their service, they are not principals in the business, but employees; and their pay, whatever it be, is part of the expenses of the business. Their omission has a reasonable basis."

The case clearly holds that the Iron Mining Company was the "producer" of the iron ore, even though the contractors did the work.

The *Lord* case illustrates the error of the Director in his holding that respondents are not engaged in the business of mining coal. The status of the Iron Mining Company and that of the respondents does not appear to differ, and it would seem to follow that if this court held the Iron Mining Company to be "engaged in the business of mining iron ore" under the Minnesota statute, there is every sound reason for a similar holding in this case as applied to respondents under Section 17(c) of the Bituminous Coal Act of 1937.

The testimony of Mr. Chas. F. Hosford, Jr., former chairman of the National Bituminous Coal Commission, one of the most ardent proponents for the regulation of the bituminous coal industry, appended as a footnote to the decision of the Circuit Court of Appeals (R. pp. 102, 103) is convincing that the operations of the respondents are not within the purview of the price-fixing regulations of the Act.

Manifestly the provisions of an act designed to regulate not production or the costs of production but commercial sales in the general market can have no possible application where there is in fact no commercial transaction or sale. Here the coal is owned in the first instance, either in place or immediately upon severance, by the railroad. An attempted application in this situation of the price-fixing provisions of the statute, under schedules which have fixed minimum prices to cover not only the cost of production as such but the royalties or value of the coal itself, would produce the patently absurd result of requiring the railroad to pay twice for the ownership element. Having already paid the landowner for the value of the coal, respondents would be required to pay for it again, and the second payment would be made to a contractor who admittedly had not the remotest interest in or title to the coal.

Under the circumstances presented by this record, the decision of the court below is so plainly correct as to foreclose further argument.

II.

Petitioners assert that the court below exercised its own independent judgment as to whether or not respondents were a "producer" within the meaning of the Act, without giving any weight to the Director's findings and decision. They seek to predicate upon this assertion the argument that the court below has in some way interfered with the independence of the administrative authority with respect to matters of fact committed to its determination. In view of the fact that there is no

dispute or controversy whatever in the record except as to the proper interpretation and application of the statute under the admitted circumstances shown to exist, the argument is irrelevent, and rests upon the mere assertion. These issues, decided by the court below adversely to petitioners' contentions, are whether or not it is the intent and purpose of the Act that the price regulatory provisions thereof apply only where a sale of or other transfer of title to the coal by the producer occurs; whether or not, in the particular case presented by this record, such sale or transfer of title by the producer occurs, and whether or not where, as in this case, the owner of coal, both before and after severance, and sole consumer of the coal produced, who employs a skilled mine operator to mine the coal and load same on cars at the mine for shipment to and consumption by such owner, is the producer of the coal and entitled to exemption from the price-fixing and related regulations of the Act. These are all questions of legislative intent as to the purpose and scope of the Act, are questions of law to be determined by the courts in the proper exercise of their judicial powers and in the determination of which the courts are not bound by administative decisions. Therefore, the decisions cited by petitioners as supporting their assertion that the court below in its decision exercised its independent judgment and failed to give any weight to the Director's findings and decision have no application to the case at bar.

If it were possible, which we think it is not, to regard the Director's decision as merely a conclusion of ultimate fact, then it is clear that the record contains no evidence to support it. There is no rational

basis for the conclusion that the owner of coal must pay a price for it to one who has no interest in it.

CONCLUSION.

The decision of the Circuit Court of Appeals, which petitioners seek to have reviewed, is correct. The petition for certiorari should be denied.

Respectfully submitted,

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